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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROLANDO DUBOUE,
Respondent

versus

THE CITY OF NEW ORLEANS
AND CLAUDELL LOGAN
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE JURY ENTITLED, IN RESPONSE TO SPECIAL INTERROGATORIES, TO FIND THAT PLAINTIFF-RESPONDENT DUBOUE SUFFERED NO MENTAL AND EMOTIONAL DAMAGES UNDER FEDERAL LAW, YET, IN RESPONSE TO ANOTHER INTERROGATORY, TO RENDER A GENERAL VERDICT THAT DUBOUE DID SUFFER DAMAGES,INCONSISTENT WITH THE SPECIAL FINDING AND CONTRARY TO LOUISIANA LAW?

II. THE NEW ORLEANS POLICE DEPARTMENT'S POLICY REQUIRES ITS OFFICERS TO OBTAIN EITHER A SEARCH WARRANT OR SIGNATURE ON A "PERMISSION TO SEARCH AND SEIZURE" FORM FROM A COOPERATING PERSON WHO POSSESSES PROPERTY INVOLVED IN A CRIMINAL INVESTIGATION BEFORE THE OFFICER REMOVES THAT PROPERTY FROM THE PERSON'S PREMISES; IS OFFICER CLAUDELL LOGAN ENTITLED TO IMMUNITY FROM LIABILITY FOR DAMAGES AND AN ATTORNEY'S FEE AWARD FOR ARRESTING ROLANDO DUBOUE PURSUANT TO THAT POLICY?

LIST OF PARTIES

This petition is for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit in Action No. 89-3350, entitled "Rolando Duboue v. City of New Orleans, *et al.*" The only parties to the appellate court action were:

1. Rolando Duboue, plaintiff/appellee/respondent;

2. The City of New Orleans, defendant/appellant/petitioner; and

3. Police Officer Claudell Logan, defendant/appellant/petitioner.

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In The
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ROLANDO DUBOUE,
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THE CITY OF NEW ORLEANS
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Petitioners

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit dated August 16, 1990, in civil action No. 89-3350, entitled "Rolando Duboue v. City of New Orleans, et. al."

OPINIONS BELOW

The Fifth Circuit's judgment and opinion, dated August 16, 1990 reproduced at appendix A of this petition, pages A-1 through A-7..

The Judgment of the United States District Court for the Eastern District of Louisiana's, dated March 17, 1989, dismissing the section 1983 claim against the City of New Orleans and entering judgment on the jury verdict is reproduced at appendix B of this petition, pages A-8 through A-9.

The district court's minute entry, dated May 4, 1989, denying the City of New Orleans' motions for judgment notwithstanding the verdict, alternatively new trial is reproduced at appendix C of this petition, page A-10.

JURISDICTION

The City of New Orleans and Police Officer Claudell Logan invoke this Honorable Court's jurisdiction for a writ of certiorari pursuant to the United States Code, Title 28, section 1254 (1), to review the Judgment of the United States Court of Appeals for the Fifth Circuit, rendered on August 16, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitutional Provisions

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const., Amend IV.

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STATEMENT OF THE CASE

This is a federal civil rights action brought under the United States Code, Title 42, section 1983, along with various state claims under Louisiana law. The United States District Court's subject matter jurisdiction was based on diversity of citizenship (28 U.S.C. sec. 1332) and civil rights (28 U.S.C. sec. 1343).

The legal duties involved herein affect the performance and operation of the United States district courts and law enforcement agencies and officers throughout the country each day. The City of New Orleans and Police Officer Claudell pray that this Honorable Court review the decisions below for several reasons. First, the Court of Appeals for the Fifth Circuit's decision affirming the inconsistent verdict form which the trial court utilized in this case sanctions a grave departure from the accepted and usual course of jury trials and verdicts under Federal Rules of Civil Procedure 49. A federal district court sitting in diversity is obligated to devise verdict forms consistent with its forum state law. This Court should review this case, fraught with error, to direct and guide the trial courts how to draft verdict forms consistent with their obligations under federal law and the applicable substantive law. The

second reason this Court should review this case is closely related to the first reason - the verdict in the case conflicts with the applicable Louisiana law.

The third reason this Court should issue a writ of certiorari is steeped in equity and this Court's prior jurisprudence. The decisions below are unfair to Officer Claudell Logan and conflict with important aspects of federal civil rights law which this Court has decided previously. See, *Michigan v. Summers*, 452 U.S. 692, 101, S.Ct. 2587, 69 L.Ed.2d 340 (1981) and *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

The facts. Rolando Duboue, a Cuban citizen and the owner of an auto parts establishment located in a high drug and crime area in New Orleans, possessed property which did not belong to him and had become the fruit of crime.[1] Paul Broussard, Sr., the property owner three (3) times complained to the New Orleans Police Department about his missing property. The department's command desk dispatched Police Officer Claudell Logan, who responded to and investigated the third call. Officer Logan went to Duboue's auto parts establishment after an arrested drug addict told him the property had been sold or pawned to Duboue. The arrested subject also told Officer Logan that Duboue stored the property in a bathroom on the premises. Officer Logan arrived at the establishment but Duboue was not present.

Alberto Vasquez, the manager on duty, denied

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[1] Those are uncontroverted facts.

having any knowledge of the property and permitted Officer Logan to look in the store's bathrooms. Both Officer Logan and Paul Broussard, Sr. viewed the property, which the latter identified as belonging to him. Logan told the manager he needed to take the property since it was involved in crime. Vasquez had been cooperating with Officer Logan, so the officer advised him of the New Orleans Police Department policy requiring a signature on a "permission to search and seizure" form before property was removed from the premises of a person cooperating with an investigating officer.[2]

Officer Logan departed from the premises and went to his police district station to procure a "permission to search and seizure" form. He returned to the establishment and Duboue, its owner, had arrived. Duboue initially refused to surrender the property without reimbursement. He later withdrew this demand and offered to surrender the property. Duboue persisted in refusing to sign the "permission to search and seizure" form which officer Logan presented to him. Officer Logan, acting upon advice from his ranking officer and an assistant district attorney, and pursuant to New Orleans Police Department policy, obtained a search warrant, returned to the establishment and arrested Duboue for possession of stolen property.

Duboue sued the City of New Orleans, Police Officer Claudell Logan and two unnamed police officers, alleging *conspiracy* to arrest him falsely and to prosecute him maliciously. The City and Officer Logan answered the complaint, denied any violations, and affirmatively asserted qualified immunity. The parties consented to proceed before a United States Magistrate, pursuant to 28 U.S.C.

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[2] This too is uncontroverted fact.

sec. 636(c). The Magistrate set a trial date of March 9, 1989 and, without either party having demanded a jury trial, placed the matter on its *jury docket.*

A jury trial was held on March 9, 1989. The trial court submitted the jury special interrogatories in a special verdict form. The federal findings and the state findings were separated on the form, which is reproduced at appendix D of this petition, pages A-11 through A-14. The jury found specially the Officer Logan did not use excess force in arresting Duboue, but that he was liable under the federal claims for unreasonable search and seizure and false arrest, and that Officer Logan acted maliciously or in callous disregard of Mr. Duboue's civil rights. The jury made the special finding, moreover, that Duboue suffered no "mental and emotional stress" or other damages as a result of the constitutional tort of false arrest and unreasonable search and seizure, and that Duboue was not entitiled to any punitive damages. (See verdict form at appendix D.)

There is an inconsistency which lies with the jury's federal and state claim findings. The jury found that Officer Logan was liable under Louisiana law for false arrest and imprisonment, abuse of process and malicious prosecution. The verdict form which the Magistrate drafted provided no way for the jury to find specially or separately pecuniary from nonpecuniary damages as required under Louisiana law. They awarded plaintiff $75,000.00 in general damages. The magistrate's customized verdict form culminated what had then become a district court case fraught with abuse of discretion and reversible error.[3]

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[3] Respondent, Duboue will argue to this Honorable Court that the jury followed his directive in distributing the award as it did. That directive does not cure the fatal defect apparent from this record's face.

The trial court entered judgment against Officer Logan and the City of Orleans for $75,000, and against Officer Logan for reasonable attorney's fees.

The trial court denied the City's and Officer Logan's motion for a judgment notwithstanding the verdict (JNOV) immediately following the jury's verdict and their written motion for JNOV and, alternatively for a new trial. See appendix C, page A-10. The City of New Orleans and Officer Logan timely filed their notice of appeal of the judgment entered on March 17, 1989 and the Magistrate's denial of their JNOV, alternatively new trial motions.

The United States Court of Appeals for the Fifth Circuit reversed the jury award of $25,000.00 for abuse of process. That court left the remaining $50,000.00 judgment intact, along with the reasonable attorney's fee award against Officer Logan.

ARGUMENT

I.

THE JURY WAS NOT ENTITLED, IN RESPONSE TO SPECIAL INTERROGATORIES, TO FIND THAT PLAINTIFF-RESPONDENT DUBOUE SUFFERED NO MENTAL AND EMOTIONAL DAMAGES UNDER FEDERAL LAW, YET, IN RESPONSE TO ANOTHER INTERROGATORY, TO RENDER A GENERAL VERDICT THAT DUBOUE DID SUFFER DAMAGES, INCONSISTENT WITH THE SPECIAL FINDING AND CONTRARY TO LOUISIANA LAW?

The problems involved in this case are neither "academic" nor "episodic." They have much practical bearing and are continuous. The problems will swell to

unmanageable proportions if not controlled because trial courts have complete discretion as to whether a special or general verdict is to be returned under Rule 49 of the Federal Rules of Civil Procedure. *Garwood v. International Paper Co.*, 666 F.2d 217 (5th Cir. 1982); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973), cert denied, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). Those courts have along with that discretion, a duty to furnish the proper form of verdict to juries. *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 121 (4th Cir. 1964); *Hagar v. Gordon*, 171 F.2d 90, 93 (9th Cir. 1948).

It is critical that the structure of the questions and proposed answers accurately mirror the applicable substantive law and avoid any possibility that the jury's answers would be conflicting. This Honorable Court should review this case because the trial court failed to have a grasp on the substantive law involved and furnished a verdict form contrary to the applicable Louisiana substantive law. The verdict form is inherently inconsistent, which inconsistency represents unacceptable judicial practice and could possibly lead to jury manipulation. This Honorable Court should review this case, issue a directive and mandate the federal trial courts to more carefully design verdict forms in accordance with the various elements of the applicable substantive law.

The federal district courts are also obligated to enter judgment on the facts which a jury finds in response to the special interrogatories submitted pursuant to Federal Rules of Civil Procedure 49(a) and 58, provided however, such facts are consistent with one another. The findings of a jury on special interrogatories must be consistent with each other. *City of Los Angeles v. Heller*, 475 U.S. 796, 805, 106 S.Ct. 1571, 1576, 89 L.Ed.2d 806 (1986); *Atlantic &*

Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S.Ct. 780, 7 L.Ed.2d 798, rehearing denied 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284 (1962). This case presents an inconsistency which lies with the fact that the jury responded to an interrogatory that plaintiff sustained no "mental and emotional stress" (nonpecuniary damages), and nonetheless awarded plaintiff damages in the amount of $75,000.00 in response to another special interrogatory. This Honorable Court should grant certiorari to decide whether a jury has such discretion.

Inconsistent jury verdicts stem from the trial courts' misunderstanding of the underlying substantive law. It is black letter law that federal district courts apply their forum state's substantive law when the court's subject matter jurisdiction is based on diversity of citizenship. 28 U.S.C. sec. 1332; 28 U.S.C. sec. 1652; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1939); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939).

The Court of Appeals for the Fifth Circuit's decision in this case affirms the trial court's departure from the accepted and usual course of judicial verdict submission under the Federal Rules of Civil Procedure. A district courts' duty to instruct the jury properly and to submit a correct verdict form under the Federal Rules can "neither abridge, enlarge nor modify the substantive rights of any litigant." 28 U.S.C. sec. 2072. The district court abused its discretion in this case when it entered judgment on the verdict form herein. The verdict form abridged the defendants rights and enlarged Duboue's by relieving the jury of its special fact finding function. That is why a directive and mandate are needed from this Honorable Court to those who submit verdicts. The problems reache beyond this

case.

The City of New Orleans and Officer Logan are entitled to have Duboue meet his burden of proof on damages, and for the jury to specify damages in accordance with the appropriate Louisiana law.[4] This Honorable Court held in *Dunlap*, supra, that a federal court must apply the burden of proof rule of the forum state as to non-federal causes of action that arose in the state. The Fifth Circuit's decision affirming the district court judgment conflicts with Louisiana statutory and jurisprudential law, and abridges the City of New Orleans and Officer Claudell Logan's Seventh Amendment jury rights, substantive rights under Louisiana law.

This case involves no physical injury or physical pain. Neither does it involve any mental suffering resulting from physical injury or pain. These are not compensable nonpecuniary damage items at issue here. Rather, this case involves Duboue's right to recover nonpecuniary damages for "suffering" *alone*, that is, his right to recover for the mental or emotional consequences of his allegedly traumatic arrest. His right to recover these damages, however, is subject to qualification under Louisiana law.

The jury's damages verdict, which the Fifth Circuit affirmed, is inherently inconsistent and is contrary to Louisiana law. Damages for false arrest in Louisiana are not statutorily determined. The Louisiana Supreme Court held, in a case in which this Honorable Court denied certiorari, that damages for false arrest in Louisiana include humiliation and embarrassment, worry and inconvenience and

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[4] See Louisiana Revised Statute at appendix K, page A-23, on personal injury damage awards applicable in this case.

mental anguish. *Hughes v. Standidge*, 219 So.2d 6, (La.App. 4th Cir. 1969), writ denied 222 So.2d 63, 254 La. 4, cert. denied 396 U.S. 887, 90 S.Ct. 177, 24 L.Ed.2d 162 (1969); see also, *Fisher v. Dept of Public Safety*, 555 So.2d 626 (La. App. 4th Cir. 1989). Damages for malicious prosecution are similar to those for false arrest and are separately identifiable. The jury in this case found that Duboue suffered no "mental and emotional stress (past and future)." (See verdict form at appendix D). The jury's general award must be set aside because Duboue did not prove separately, and the jury did not determine separately, each separate item of compensable damages as required under Louisiana law.

Itemization of Compensatory Damage Verdicts by Category of Loss under Louisiana law. A jury verdict against a Louisiana political subdivision must separate the amounts of damages awarded into itemized categories for economic damages and noneconomic damages. That is, the verdict must itemize general damages (noneconomic, excluding medical expenses and lost earnings), medical expenses and future medical expenses, and lost earnings. Louisiana statutory law specifies this special verdict or special interrogatory procedure. Louisiana Revised Statutes, Title 13, section 5106, reads in pertinent part:

> If the state or a state agency or political subdivision is held liable for damages for personal injury or wrongful death, the court shall determine:
> (1) The amount of general damages exclusive of:
> (a) Medical care,
> (b) Related benefits,
> (c) Loss of earnings and/or support, and
> (d) Loss of future earnings and/or support;
> (2) The amount of medical care, related benefits and loss of earnings and/or support to date of judgment;

(3) Whether the claimant is in need of future medical care and related benefits and the amount thereof; and (4) Whether there will be a loss of future earnings or support, and the amounts thereof.

The court of appeals reversed the jury's liability determination on plaintiff's state "abuse of process" claim, since Duboue did not support that claim with the evidence. The court of appeals thereby reduced the overall $75,000.00 jury award by $25.000.00; however, it erred in not reversing the judgment and remanding for a new trial or even remitting the remaining $50,000.00.

The jury's itemizing the verdict allows courts of appeal to exercise more rigorous and knowledgable scrutiny over the amounts of the award, permitting rational application of remittitur. Itemization controls the jury by requiring them to calculate more carefully and to rely on evidentiary support, rather than allowing gross and arbitrary single amounts as the jury did in this case. Certiorari is appropriate here for this Honorable Court to issue a directive and mandate accordingly.

The trial court should have included the required breakdowns in the verdict form. It should have organized the elements of damages (e.g. economic) in outline form and then put the sub-elements (e.g. medical expenses) beneath the general category. It was also necessary to organize a sub-element of future loss beneath the medical category. The form submitted was not sensible and understandable to the jury and not in compliance with law. The jury wondered why the trial court itemized the elements of damages under the federal claims and not under the state claims. Again, these issues are neither "academic" nor "episodic."

Federal Rules of Civil Procedure 49(b) indicates that

the appropriate remedy for inconsistent special verdicts and general verdicts is resubmission to the jury or a new trial.

> Whenever a general award that includes numerous elements of damages is greater than the legal maximum recoverable for any one element, it is impossible to determine on appeal whether the award is excessive or not: the jury may have awarded an excessive amount for that one item and nothing at all for the remaining elements. . .[B]ecause of the general verdict in this case, and the failure of the trial court to submit special interrogatories to the jury on the individual elements of damages, a new trial is required on the elements comprising the general award.

In Re Air Crash Diaster at New Orleans, La., 795 F.2d 1230, 1235-36 (5th Cir. 1986).

Time to object to verdict form. Review is appropriate in this case also because this Court may resolve a conflict which exists among the circuits relative to objection and at what point a litigant waives his or her right to object to an inconsistent verdict form.

A party cannot object for the first time on appeal as to the form of a general jury verdict submitted pursuant to Rule 49(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 49(b); *J.C. Motor Lines, Inc. v. Trailways Bus Systems, Inc.*, 689 F.2d 599 (5th 1982). Special verdicts submitted in the and rendered pursuant to rule 49(a), on the other hand, do not require an objection before the court discharges the jury. The 49(b) "time of objection" rule simply is inapplicable to special verdicts submitted in the

fifth and other circuits.[5] *Malley-Duff & Associates v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3rd Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 564, 83 L.Ed.2d 505 (1984); *Pierce v. Southern Pacific RR.*, 823 F.2d 1366 (9th Cir. 1987); *Brunner v. Maritime Overseas, Inc.*, 779 F.2d 296 (5th Cir. 1986); *Ladnier v. Murray*, 769 F.2d 195 (4th Cir. 1985); *Mercer v. Long Mfg. N. C., Inc.*, 671 F.2d 946 (5th Cir. 1982); *Auwood v. Harry Brandt Booking Office, Inc.*, 647 F. Supp. (D. Conn. 1986).

The federal circuits are not in accord, and this Honorable Court has not decided whether a litigant who does not make an objection to a special verdict form at trial has waived his or her right to complain about it on appeal. The First and Eleventh Circuits do not permit a litigant to complain about inconsistent jury responses to special interrogatories and verdicts on appeal unless the litigant timely objects in the trial court. *Intel Capital Corp. v. Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981). Review here is appropriate.

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[5] The Court of Appeals for the Fifth Circuit did not address this issue in its opinion. The City of New Orleans and Officer Logan anticipate that respondent, Duboue will raise this matter.

II.

THE NEW ORLEANS POLICE DEPARTMENT'S POLICY REQUIRES ITS OFFICERS TO OBTAIN EITHER A SEARCH WARRANT OR SIGNATURE ON A "PERMISSION TO SEARCH AND SEIZURE" FORM FROM A COOPERATING PERSON WHO POSSESSES PROPERTY INVOLVED IN A CRIMINAL INVESTIGATION BEFORE THE OFFICER REMOVES THAT PROPERTY FROM THE PERSON'S PREMISES; IS OFFICER CLAUDELL LOGAN ENTITLED TO IMMUNITY FROM LIABILITY FOR DAMAGES AND AN ATTORNEY'S FEE AWARD FOR ARRESTING ROLANDO DUBOUE PURSUANT TO THAT POLICY?

This writ petition asks this Honorable Court to decide whether law enforcement officer Claudell Logan is entitled to qualified immunity. He detained Duboue momentarily without an arrest warrant while searching for evidence pursuant to a search warrant obtained in accordance with New Orleans Police Department policy, and he then arrested Duboue after the officer found the property involved in crime. Whether Officer Logan may be held personally liable for an allegedly unlawful official act turns on the objective legal reasonableness "of the action. . . assessed in light of the legal rules that were clearly established at the time it was taken". *Harlow v. Fitzgerald*, 457 U.S. 800, S.Ct. 2727, 73 L.Ed.2d 396 (1982). This Honorable Court should decide whether an officer's compliance with police department policy is objectively reasonable when that policy has not been held to be constitutionally defective, as in this case. This case is fraught with error and inequity, all militating against a police officer who perceived crime afoot and complied with law and department policy to stop it.

The City of New Orleans and Officer Logan here combine three arguments to support the writ petition and to attack the jury verdict against them under the Civil Rights Statute, 42 U.S.C. Sec. 1983, for unreasonable search and seizure and false arrest. First, the totality of the circumstances approach determines whether the informant's telling Officer Logan where in Duboue's establishment the property was stored established probable cause for issuance of the facially and legally valid search warrant. Second, whether application of *Michigan v. Summers*, 452 U.S. 692, 101, S.Ct. 2587, 69 L.Ed. 2d 340 (1981), mandates a finding that the officer's detaining Duboue while executing the search warrant was a constitutionally valid detention. The third argument and reason why a writ of certioari should issue herein is a corollary of this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 80[illegible] (1986): is a government employee's reliance on his or her employer's official policy objectively reasonable?

Does Michigan v. Summers[6] extend to a search for property involved in crime? This Court has recently held that only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity in a section 1983 action be lost.[7] A police officer is qualifiedly immune from liability under 42 U.S.C. Section 1983 if reasonable competent police officers could disagree as to the existence of probable cause to detain or arrest prior to the execution of a search warrant, or even whether complying with police department warrant policy is constitu-

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6 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed. 2d 340 (1981)

7 *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

tionally violative. *Anderson v. Creighton,* 483, U.S. 635, 107, S.Ct. 3034, 97 L.Ed. 2d 523 (1987); *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed. 2d 340 (1981); *City of Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) *Melear v. Spears,* 862 F.2d 1177 (5th Cir. 1989). The test is one of "objective legal reasonableness" of the Officer's acts.

Does City of Los Angeles v. Heller mandate a reversal of the Fifth Circuit's decision? This Honorable Court has held that a special jury verdict finding that a government employee did not inflict any constitutional injury removes any basis for liability against the governmental employer. *City of Los Angeles v. Heller,* supra. The Court should review this case to decide the converse of *Heller.* Should a government employee be entitled to qualified immunity when he or she is found to have inflicted a constitutional injury while acting in accordance with valid and legitimate government official policy?

Claudell Logan's ranking officer and an assistant district attorney instructed him how to proceed in this case. Logan was faced with his duty to remove property involved in crime from premises and police department policy requiring either a search warrant or the premises owner's signature on the "permission to search and seizure" form. Logan unequivocally imparted that information and policy to Duboue, to the point of pleading with him to sign the "permission to search and seizure" form. Logan should not be held liable for the discretionary act of arresting Duboue.

This Honorable Court should assert its supervisory jurisdiction and fix the inequity and legal error in the jury's verdict that Police Officer Logan is liable to pay Duboue's attorney's fee, pursuant to 42 U.S.C. sec. 1988.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

REGINALD J. LAURENT,
Assistant City Attorney
1300 Perdido St., Rm 5E28
New Orleans, LA 70112
(504) 565-6220

Counsel for Petitioners

Brett J. Prendergast,
Deputy City Attorney

William Aaron, Jr.,
Chief Deputy City Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon opposing counsel of record by placing a copy of same in the United States Mail, postage prepaid, this 14 day of November, 1990.

REGINALD J. LAURENT

APPENDIX A

Rolando P. Duboue,
Plaintiff-Appellee

v.

The CITY OF NEW ORLEANS and
Claudell Logan,
Defendants-Appellants.

No. 89-3350

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1990.

Arrestee brought action against police oficer for, inter alia, malicious prosecution, false arrest, and abuse of process. The United States District court for the Eastern District of Louisiana, Jacob J. Meyer, United States Magistrate, entered judgment on jury verdict for arrestee, and appeal was taken. The Court of Appeals, Garza, Circuit Judge, held that evidence was sufficient to support verdict on false arrest and malicious prosecution charges but not on abuse of process charge.

Reversed in part and affirmed as modified.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, HIGGINBOTHAM, and DUHE, Circuit Judges.

GARZA, Circuit Judge:

After a jury trial in which Appellants were found liable under state and federal claims but damages were awarded only under the state claims, Appellants appeal to this Court seeking relief. Finding under these facts, that the tort of abuse of process could not be satisfied, we REVERSE the award of $25,000.00 on the abuse of process claim and AFFIRM the district court in all other things.

1. The Facts.

Rolando Duboue, owner of the Royal Auto Parts Store, filed suit against the City of New Orleans, Police Officer Claudell Logan and two unnamed police officers, alleging civil rights violations with several pendant state law claims. A jury trial was held on March 9, 1989. The City of New Orleans' motion for directed verdict was granted as to the section 1983 claims only. Officer Logan's similar motion was denied.

The jury found Officer Logan liable under federal claims for unreasonable search and seizure, false arrest, and malicious or callous disregard for Mr. Duboue's civil rights. However, the jury chose not to award any damages for the federal claims. The jury also found that Officer Logan was liable under the pendant state claims of malicious prosecution, abuse of process, and false arrest and imprisionment. The jury chose to award $25,000.00 in damages for each of the state tort claims. Judgment was entered against Officer Logan and the City of New Orleans for $75,000.00, and against Officer Logan for reasonable attorneys fees.

Defendants moved for a judgment not-withstanding the verdict (JNOV) and, alternatively for a new trial. Both

motions were heard and denied. Both parties timely filed their notice of appeal of judgment and the denial of both motions.

Plainly stated, the facts involve a father, a son, and an automobile parts store owner. The son, Paul Broussard, Jr., took, the father's car without his knowledge or permission. When his son did not return, Paul Broussard, Sr. placed several phone calls to the New Orleans Police Department reporting a stolen car. When the car was finally returned, two Lincoln Continental wheels and a jack were missing. Upon finding young Broussard, the last known location of the wheels was determined. Young Broussard had pawned them to Rolando Duboue, owner of the Royal Auto Parts Store. While the wheels were allegedly worth in excess of $100, the deal was cut for a sum in the range of ten to twenty dollars. The only relevance for these figures is in regard to Duboue's knowledge of obtaining stolen property.

Appellants claim that young Broussard knew exactly where the property was because he had placed it in Duboue's store. With this knowledge, Officer Logan, together with a young and old Broussard, went to Royal Auto Parts. Upon arrival in a marked police cruiser, Officer Logan, in uniform, approached the store manager, Mr. Vasquez, and allegedly informed him that young Broussard had admitted stealing some rims. Officer Logan asked permission to go to the restroom, which was granted by Vasquez. This permission was hotly contested and in significant dispute as to its scope. Royal Auto Parts was equipped with only one functioning restroom. The tires were stored in a storeroom, which did contain a single cracked, nonfunctioning commode. Vasquez gave permission only to search the functioning restroom. Officer Logan looked in both rooms after only receiving the initia' grant of

permission.

Upon finding the property in the second room, the elder Broussard identified the rims as the ones stolen from him. At this point, Officer Logan left the store to obtain a form identified as a "Permission to Search and Seizure."- Purported police procedure was to obtain either a signature on this form or a search warrant.

When Officer Logan returned with the form, he was met by Duboue, the owner, rather than Vasquez. Duboue refused to sign the form and only after conferring with his attorney did he turn over the rims. Without a signature on the consent form, Oficer Logan took the second option in the police procedure, which was to obtain a search warrant. Officer Logan informed Duboue that if he did not sign the form and a search warrant had to be issued that Duboue would be arrested in connection with executing the warrant. Duboue was not persuaded.

Officer Logan appeared before Magistrate Hansen to obtain a warrant. The content and validity of the information presented to the court are disputed. Officer Logan left with a signed warrant and the impression that if Duboue had any reason to know the rims were stolen, then Officer Logan was legally authorized to arrest him.

As promised, Officer Logan returned to Duboue's store with "back-up" and a signed warrant. The entourage left with the stolen property and Duboue in custody. As a result of this arrest, Appellee presents a long and detailed description of the arrest and the traumatic problem it has caused in Duboue's life.

II. The Law.

The standard of review is clear that the test is

"whether the evidence, viewed in the light most favorable to the nonmoving party, is such that reasonable people could not arrive at a contrary verdict." *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989); *Keys v. Lauga*, 635 F.2d 330 (5th Cir. 1981).

A. Federal Claims

As the jury chose not to award damages for the federal claims after finding liability and finding no error in the district court analysis, we affirm the district court on these points.

B. State Law Claims.

[1.2] Appellants challenge the sufficiency of the evidence to uphold the state law claims. The elements of the tort of malicious prosecution are as follows: (1) commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to plaintiff. *Johnson v Pearce*, 313 So.2d 812, 816 (La.1975); *Robinson v. Goudchaux's*, 307 So.2d 287, 289 (La.1975). Logan disputes the existence of substantial evidence as to probable cause and malice. The record demonstrates that Logan did not arrest Duboue when he discovered he possessed the tires, but rather he waited until after Duboue refused to sign the consent form. Further, arguable Duboue did not know the tires were stolen and Officer Logan knew the tires were not stolen. Thus, Officer Logan did not have probable cause to arrest and could not reasonably have

believed he did. There is substantial evidence to conclude, as the jury did, that Officer Logan arrested Duboue out of anger at him for persisting in his legitimate refusal to sign the consent form.

[3-5] The essential elements of a cause of action for abuse of process are (1) the existence of an ulterior purpose; and (2) a wilful act in the use of the process not in the regular prosecution of the proceeding. *Stark v. Eunice Superette, Inc.*, 457 So.2d 291 (La.App. 3 Cir.1984), citing *Vasseur v. Eunice Superette, Inc.*, 386 So.2d 692 (La. App. 3 Cir.1980), *writ refused*, 393 So.2d 747 (La.1980); *Owl Construction Co., Inc. v. Ronald Adams Contractor, Inc.*, 642 F.Supp. 475 (E.D.La.1986). The precise inquiry involves the misuse of a process already legally issued whereby a party attempts to obtain some result not proper under law. *Succession of Cutrer v. Curtis*, 341 So.2d 1209 (La.App. 1 Cir. 1976), *writ denied*, 343 So.2d 201 (La.1977), citing *Gonsouland v. Rosomano*, 176 F. 481 (U.S. CCA 5th Cir. 1910). Officer Logan contends again that there is insufficient evidence to support an abuse of process claim. While Logan's challenge to the existence of an ulterior purpose or motive is against the weight of the evidence, his claim that this case does not involve abuse of process is on sounder ground. The tort of abuse of process involves the malicious use of a legal process *after* the process has been instituted. *Succession of Cutrer v. Curtis*, 341 So.2d 1209, 1214 (La.App. 1 Cir.1976). *writ denied*,343 So.2d 201 (La.1977). In this case, Officer Logan instituted the process, but did nothing further in carrying it to its conclusion. Therefore, Officer Logan cannot be said to have abused the process after its institution. Thus, the award of $25,000.00 for abuse of process is hereby reversed.

[6,7] The tort of false arrest require the plaintiff to prove that the arrest was made without any legal process

or warrant or under a warrant null and void on its face. *Tillman v. Holsum Bakeries, Inc.*, 244 So.2d 681 (La.App. 4 Cir.1971), *application denied*, 258 La. 352, 246 So.2d 199 (La.1971). Appellants challenge the sufficiency of the evidence. The jury, supported by the record, found that Officer Logan's arrest was without a valid warrant or even probable cause. Thus, the jury finding of false arrest must stand.

III. the End Result.

While the jury found Officer Logan liable on both federal and state claims, at the request of plaintiff's counsel, chose only to award damages on the state law claims. Consequently, the answers to the federal claims serve only as evidence of the jury's factual determinations. Based on the fact the Officer Logan did not participate in the process other than its institution, the award of $25,000.00 for abuse of process must be REVERSED. The district court's judgment is MODIFIED and damages reduced by $25,000.00 resulting in a total of $50,000.00, and as MODIFIED the judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED Mar 17 89

ROLANDO P. DUBOUE	CIVIL ACTION
VERSUS	NUMBER 88-663
CITY OF NEW ORLEANS, ET AL	SECTION "B" (3)

J U D G M E N T

Considering the answers returned by the jury to the interrogatories propounded by the Court; and

Further considering that the Court had previously granted the City of New Orleans' motion to dismiss plaintiff's claims for relief against it; and

Further considering the direction of the Court as to entry of judgment;

Accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Rolando P. Duboue, and against defendants, Claudell Logan and the City of New Orleans, jointly, severally and in solido, in the sum of Seventy Five Thousand and 00/100 ($75,000.00) Dollars, together with legal interest thereon from date of judicial demand until paid, and for all costs of this proceeding.

DATE OF ENTRY - MAR 17 1989

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Rolando P. Duboue and against defendant, Claudell Logan, for reasonable attorney's fees.

Dated at New Orleans, Louisiana, this 16th day of March, 1989.

/s/ Loretta G. Whyte

LORETTA G. WHYTE
CLERK OF COURT

APPENDIX C

MINUTE ENTRY
MEYER, M.
MAY 3, 1989

FILED May 3 89

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROLANDO P. DUBOUE	CIVIL ACTION
VERSUS	NO. 88-663
CITY OF NEW ORLEANS, ET AL.	SEC. "B"(3)

RULING ON MOTION

Defendants' Motion for Judgment Notwithstanding the Verdict and Alternatively Motion for New Trial came on for hearing before us on Wednesday, April 26, 1989 at 9:00 a.m.

PRESENT:

Reginald Laurent, representing the defendants
Julian Murray, representing the plaintiff
Romi Gonzalez, representing the plaintiff

IT IS ORDERED that motion of defendant for judgment notwithstanding the verdict or alternatively for a new trial be and the same hereby is DENIED.

DATE OF ENTRY - MAY 4 1989

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
RECORD EXCERPT 'A"

ROLANDO P. DUBOUE	CIVIL ACTION
VERSUS	NO. 88-663
CITY OF NEW ORLEANS, ET AL.	SEC. "B" (3)

VERDICT FORM

1. Did plaintiff, Rolando Duboue, prove by a preponderance of the evidence that his constitutionally protected right to be free from unreasonable searches and seizures was violated by defendant, Officer Claudell Logan?

YES ✓ NO ___

PROCEED TO NO. 2.

2. Did plaintiff, Rolando Duboue, prove by a preponderance of the evidence that his constitutionally protected right to be free from false arrest was violated by the defendant, Offficer Logan?

YES ✓ NO ___

PROCEED TO NO. 3.

3. Did plaintiff, Rolando Duboue, prove by a preponderance of the evidence that his constitutionally protected right to be free from the use of excessive force

while being placed under arrest was violated by the defendant, Officer Logan?

YES ___ NO ✓

PROCEED TO NO. 4 *ONLY IF* YOU ANSWERED "YES" TO ANY OR ALL OF QUESTIONS 1, 2, AND 3. OTHERWISE, PROCEED TO QUESTION NO. 7.

4. What amount of damages, expressed in terms of dollars, has the plaintiff, Rolando Duboue, proved by a preponderance of the evidence that he suffered as a result of the violation of his civil rights?

PHYSICAL PAING AND SUFFERING (Past and Future) $_____

MENTAL AND EMOTIONAL STRESS (Past and Future) $_____

PAST AND FUTURE MEDICAL EXPENSES $_____

PROCEED TO QUESTION NO. 5.

5. Do you find from a preponderance of the evidence that Officer Logan's conduct, in arresting plaintiff Duboue and searching his place of business, was malicious or in callous and reckless disregard of the plaintiff's civil rights?

YES ✓ NO ___

IF YOU ANSWERED "YES" TO QUESTION NO. 5, PROCEED TO QUESTION NO. 6. IF YOU ANSWERED

"NO" TO QUESTION NO. 5, PROCEED TO QUESTION NO. 7.

6. Express in terms of dollars the amount of punitive damages that you find.

$_____$

PROCEED TO QUESTION NO. 7.

7. Did Plaintiff Rolando Duboue show by a preponderance of the evidence that under Louisiana law, the search of his place of business, the seizure of the wheels, and his subsequent arrest and booking for possession of stolen property, constituted malicious prosecution by the defendant, Officer Logan?

YES ✓ NO ___

PROCEED TO QUESTION NO. 8.

8. Did Plaintiff Rolando Duboue show by a preponderance of the evidence that under Louisiana law, the search of his place of business, the seizure of the wheels, and his subsequent arrest and booking for possession of stolen property, constituted an abuse of process by defendant, Officer Logan?

YES ✓ NO ___

PROCEED TO QUESTION NO. 9.

9. Did Plaintiff Rolando Duboue show by a preponderance of the evidence that under Louisiana law, his arrest and booking for posession of stolen property, constituted a false arrest and imprisonment by defendant, Officer

Logan?

YES ✓ NO ___

PROCEED TO QUESTION NO. 10 *ONLY IF* YOU ANSWERED "YES" TO ANY OR ALL OF QUESTIONS 7, 8, AND 9. OTHERWISE, THE FOREPERSON SHALL DATE AND SIGN THIS VERDICT FORM AND YOU SHALL RETURN TO THE COURTROOM.

10. WHAT AMOUNT OF DAMAGES, EXPRESSED IN TERMS OF DOLLARS, HAS THE PLAINTIFF, Rolando Duboue, proved by a preponderance of the evidence that he suffered as a result of the following:

Malicious Prosecution:	$25,000
Abuse of Process:	$25,000
False Arrest and Imprisonment:	$25,000

AFTER COMPLETING THIS VERDICT FORM, THE FOREPERSON SHALL SIGN AND DATE THE VERDICT FORM AND YOU SHALL RETURN TO THE COURTROOM.

DATE: 3-10-89 FOREPERSON: /s/ Illegible

APPENDIX E

TITLE 28

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be ad-

judged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and in addition, may impose costs on the plaintiff.

APPENDIX F

28 U.S.C. § 1343 Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) to recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

28 U.S.C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

APPENDIX H

28 U.S.C. § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

APPENDIX I

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX J

Federal Rules of Civil Procedure 49 - Special verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied By Answer To Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are

harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

APPENDIX K

Louisiana Revised Statutes, Title 13 sec. 5106 (C) (1985):

If the state or a state agency or political subdivision is held liable for damages for personal injury or wrongful death, the court shall determine:

(1) the Amount of general damages exclusive of:
(a) Medical care,
(b) Related benefits,
(c) Loss of earnings and/or support, and
(d) Loss of future earnings and/or support;
(2) the amount of medical care, related benefits and loss of earnings and/or support to date of judgment;
(3) Whether the claimant is in need of future medical care and related benefits and the amount thereof; and
(4) Whether there will be a loss of future earnings or support, and the amounts thereof.